

Innovative Readiness Training Under 10 U.S.C. § 2012: Understanding the Congressional Model for Civil-Military Projects

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[I]nnovation rarely makes its way by gradually winning over and converting its opponents: . . . What does happen is that its opponents gradually die out and the growing generation is familiarized with the idea from the beginning.

Max Planck¹

Not a whit, we defy augury; there's a special providence in the fall of a sparrow. If it be now, 'tis not to come; if it be not to come, it will be now; if it be not now, yet it will come: the readiness is all.

William Shakespeare²

Training is everything. The peach was once a bitter almond; cauliflower is nothing but cabbage with a college education.

Mark Twain³

Introduction

You are the staff judge advocate at a large command. Your commander receives a phone call one day from the chancellor of a nearby state university. It seems the university wants to build a new track field but cannot afford the construction costs. The chancellor wants to know if the local military could lend a

hand by sending some construction personnel and equipment to help out with the project. The commander, not wanting to break the law, turns to you for advice, saying, "Let's try to find a legal way to do this, if possible. I think it would be good public relations and valuable training for our engineers." Your immediate reaction, though a silent one, is not positive. Thinking back to your days as an ethics counselor and operational law attorney, you cannot immediately envision a legal means of undertaking such a huge commitment in the civilian community. In fact, doing so would seem to counter a basic presumption that non-emergency military involvement in civilian projects should be extremely limited.⁴ Worried about giving the commander a hasty answer, however, you decide to research the issue.

Phone calls such as this are becoming more frequent in the post-Cold War era. One reason for this increase is a relatively new program known as "innovative readiness training," or IRT, which is "[m]ilitary training conducted off base in the civilian community that utilizes the units and individuals of the Armed Forces . . . to assist civilian efforts in addressing civic and community needs of the United States, its territories and possessions, and the Commonwealth of Puerto Rico."⁵ As word has spread about the IRT program, both civilian and military leaders have increasingly turned to the armed forces as an asset in conducting domestic projects.⁶ Military attorneys must understand the parameters of the IRT program before providing advice to commanders.

1. MAX PLANCK, *THE PHILOSOPHY OF PHYSICS* (1936), quoted in BARTLETT'S FAMILIAR QUOTATIONS, EXPANDED MULTIMEDIA EDITION (1995).
2. WILLIAM SHAKESPEARE, *HAMLET*, act 5, sc. 2, l. 232 (1600-1601), quoted in BARTLETT'S FAMILIAR QUOTATIONS, EXPANDED MULTIMEDIA EDITION (1995).
3. MARK TWAIN, *PLUCK'NHEAD WILSON*, ch. 5 (1894), quoted in BARTLETT'S FAMILIAR QUOTATIONS, EXPANDED MULTIMEDIA EDITION (1995).
4. The strong American interest in limiting military involvement in civilian affairs dates back to the Declaration of Independence, which stated among its reasons for seeking liberty from Great Britain that the King "has affected to render the Military independent of and superior to the Civil power." *THE DECLARATION OF INDEPENDENCE* para. 14 (U.S. 1776). For a diverse discussion by military officers and officials of the proper balance in civil-military relations, see the following articles: Lieutenant Commander W. Kent Davis, *Swords into Plowshares? The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61 (1998); Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the Military*, 29 WAKE FOREST L. REV. 341 (1994); Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, *THE NAT'L INTEREST*, Spring 1994, at 3; Captain Edward B. Westermann, *Contemporary Civil-Military Relations: Is the Republic in Danger?*, *AIRPOWER J.*, Summer 1995, available at <http://www.airpower.maxwell.af.mil/archives/apj/wester.html>.
5. U.S. DEPT. OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE, para. E2.1.8 (30 Jan 1997) [hereinafter DOD DIR. 1100.20].
6. For example, in fiscal year 1997, military units participated in approximately 129 IRT projects. See GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), available at <http://www.fas.org/man/gao/nsaid98084.htm>. By fiscal year 1998, this number had risen to approximately 176. See Office of the Assistant Secretary of Defense for Reserve Affairs, *Civil-Military Innovative Readiness Training*, at <http://raweb.osd.mil/initiatives/irt.htm> (last visited Jan. 21, 2000) [hereinafter IRT Web Site]. By fiscal year 1999, the number exceeded 200. See Linda D. Kozaryn, *Innovative Training Benefits Troops, Communities*, American Forces Press Service, Oct. 1999, at http://www.defenselink.mil/news/Oct1999/n10271999_9910272.html. This amounts to a more than fifty-five percent increase in only two years.

This article provides an overview of the IRT program, particularly the procedural steps that must be accomplished when undertaking any particular project. First, however, to gain a clearer understanding of the current IRT program, a bit of political history is necessary.

The Evolution of Civil-Military Projects

Early Precursors to the IRT Program

Despite the nation's traditional interest in limiting military involvement in civilian affairs,⁷ the armed forces have long contributed to the building of the domestic infrastructure.⁸ For example, after Lewis and Clark completed their famous land expedition to the Pacific Ocean, President Thomas Jefferson tasked the Army with surveying the new frontier for future development.⁹ Indeed, for awhile West Point served as the nation's only surveying school, and helped train scientists and engineers to design numerous domestic projects for the growing United States.¹⁰ Over the ensuing decades, military personnel helped develop routes for railroads, build civilian parks, sewers, and lighthouses, and engaged themselves in many other domestic projects.¹¹ In the words of one historian, "[t]hese contributions improved the health and productivity of communities across the nation."¹² One need only look at the continuing role of the Army Corps of Engineers to appreciate the involvement of the military in the building and maintaining of the nation's infrastructure. Until the 1980s, most military involvement in civil projects was limited to special units specifically established just for that purpose. However, the domestic involve-

ment of military units and personnel whose normal role is fighting wars has been another matter entirely.

The stage for greater military involvement in civil projects was set in the New Deal era of President Franklin Roosevelt. In the one hundred days following 4 March 1933, President Roosevelt succeeded in pushing many new federal programs through Congress.¹³ Most Americans are familiar with some of these New Deal programs, which sought a greater role for the federal government in building up the nation's infrastructure—programs such as the Works Progress Administration and the Tennessee Valley Authority.¹⁴ However, most would be surprised to learn the depth of military involvement in the New Deal.

One of the most popular New Deal programs was the Civilian Conservation Corps (CCC), an agency set up to hire unemployed young men to plant trees, fight forest fires, build dams, and complete conservation work in the national parks.¹⁵ At first, the U.S. Army was given the minimal role of immunizing CCC participants, issuing them clothing and equipment, and setting up a military-style organization for the CCC camps.¹⁶ Other federal agencies—the Departments of Interior and Agriculture—were given the task of actually commanding the camps.¹⁷ Very quickly, however, the Army was directed to assume "complete and permanent control" of the CCC, and the Army's role grew accordingly.¹⁸ By July 1933, there were a total of 1315 CCC camps in operation, each with "[two] Regular officers, [one] Reserve officer, [and] [four] enlisted men of the Regular Army."¹⁹

7. See *supra* note 4. The U.S. Supreme Court has echoed this sentiment, noting "a traditional and strong resistance to any military intrusion in civilian affairs." *Laird v. Tatum*, 408 U.S. 1, 17 (1972). Several U.S. statutes seek to specifically delineate the limits of military involvement in civil affairs. See, e.g., Posse Comitatus Act, 10 U.S.C. § 1385 (2000) (severely limiting military involvement in civilian law enforcement); Stafford Act, 42 U.S.C. §§ 5121-5202 (2000) (outlining the authority of the military to furnish domestic disaster assistance).

8. See Tara Rigler, *Army's Legacy More Than National Security*, ARMY NEWS SERV., June 12, 2000, available at <http://www.dtic.mil/armylink/news/Jun2000/a20000612history.html>; IRT Web Site, *supra* note 6.

9. See Rigler, *supra* note 8.

10. See *id.*

11. See *id.*

12. *Id.*

13. See Walter Johnson, *Franklin Delano Roosevelt*, in COLLIER'S ENCYCLOPEDIA CD-ROM: UNABRIDGED TEXT VERSION (1996).

14. See *id.*

15. See *id.* See also James T. Patterson, *Civilian Conservation Corps*, in WORLD BOOK MILLENNIUM 2000 CD-ROM (1999).

16. See U.S. DEP'T OF ARMY, PAM. 140-14, TWICE THE CITIZEN: A HISTORY OF THE UNITED STATES ARMY RESERVE, 1908-1995, 43 (1997). Following Army structure, the CCC camps were quickly organized into companies of 200 men each. See *id.*

17. *Id.*

18. *Id.* at 44.

19. *Id.*

To augment the Regular Army personnel serving with the CCC, President Roosevelt soon authorized additional members of the Officers' Reserve Corps (ORC) to act as commanders of CCC units.²⁰ The use of ORC members was seen as a winning situation for all involved: the individual officers often needed the work during the unemployment of the Great Depression, the Army regarded their work as good military training in "practical leadership," Regular Army officers were freed to pursue their customary military duties, and the CCC enrollees had often complained that the Regular Army commanders were "too military."²¹ In addition to these advantages, though the CCC camps were racially segregated (with the exception of selected camps in California), black members of the ORC were also given the opportunity to serve on active duty with the CCC, and were even placed in command of all-black units.²² Given these many benefits, it is not surprising that by the end of fiscal year 1934, the number of Regular Army members on duty with the CCC had dropped to less than 500, while the number of ORC members had risen to nearly 6000.²³ By the end of 1939, it is likely that more than 30,000 ORC members had served on active duty with the CCC,²⁴ a tremendous diversion of military assets to domestic projects.

On 31 December 1939, the military role in the CCC largely came to an end with President Roosevelt's order that all ORC members were to be placed in civilian status.²⁵ The CCC itself lasted until Congress abolished it in 1942, by which time more than two million men had served as CCC enrollees.²⁶ The lessons of such a huge program would not be lost on later politicians, however. President John Kennedy sought to reestablish some form of the CCC before his death, and President Lyndon Johnson revived many of the New Deal efforts with his "Great Society" programs of the 1960s.²⁷ Later, President Bill Clinton sought to invoke the spirit of the CCC in some of his new initi-

atives, particularly the AmeriCorps program.²⁸ Even the military appeared to learn valuable lessons from its CCC experience, for several benefits from that program would clearly be incorporated in its later efforts to establish civil-military programs—particularly the use of Reserve personnel, the emphasis on building the nation's infrastructure while simultaneously bettering the environment, the focus on improving the readiness and training of participants, and the benefits to race relations.

The Department of the Army Domestic Action Program (DADAP)

In 1975, the Army once again sought to formally venture into the realm of civil-military projects. In that year, under the leadership of Secretary Howard "Bo" Callaway, the Army established the Department of the Army Domestic Action Program (DADAP), and issued *Army Regulation (AR) 28-19* to govern its implementation.²⁹ The DADAP was viewed as "[a]n aggregation of coordinated domestic action activities conducted by all [Army] components to assist local, State, and Federal agencies in the continued improvement and development of society."³⁰ The focus of the program was to be "directed toward projects which are considered as benefiting the disadvantaged of the civilian community,"³¹ including the provision of health and medical support.³² The more specific goals of the DADAP foreshadow many of the goals of the current IRT program. The following were the specific DADAP goals:

- a. Providing opportunities for cooperative civil/military efforts to foster mutual understanding.

20. *See id.*

21. *Id.*

22. *Id.* at 44-45.

23. *Id.*

24. *Id.* at 45.

25. *Id.*

26. Patterson, *supra* note 15.

27. *See* Adam Karlin, *AmeriCorps Volunteers Aim to Change Community, Campus*, THE DAILY, Feb. 2, 2000.

28. *See id.*

29. *See* U.S. DEP'T OF ARMY, REG. 28-19, DEPARTMENT OF THE ARMY DOMESTIC ACTION PROGRAM (13 Mar. 1975) [hereinafter AR 28-19]; *see also* 138 CONG. REC. S8602 (daily ed. June 23, 1992) (statement of Sen. Nunn). *Army Regulation (AR) 28-19* has since been rescinded. *See infra* note 41 and accompanying text.

30. AR 28-19, *supra* note 29, para. 2 b. Despite this seemingly broad language, AR 28-19 was just as quick to point out that DADAP did not include certain programs already in existence, such as the use of National Guard personnel for disaster relief. *See id.* para. 3.

31. *Id.* para. 2 b.

32. *See id.* paras. 8-14.

- b. Advancing equal opportunity in the Nation and alleviating racial tension.
- c. Enriching the civilian economy by transfer of technological advances and manpower skills.
- d. Improving the ecological environment and the economic and the social conditions of society.
- e. Providing training opportunities for [individual soldiers] and/or units.
- f. Providing opportunities for voluntary involvements by military . . . members of the Department of the Army in constructive community, State, and regional projects.
- g. Increasing the opportunities for disadvantaged citizens to receive employment, training, education, and recreation.
- h. Enhancing individual and unit morale through meaningful community involvement.³³

In another important foreshadowing, *AR 28-19* also noted that DADAP projects "will not be permitted to interfere with a unit's primary mission," but encouraged commanders "to use innovative and creative training techniques to gain or maintain mission readiness by integrating domestic action projects into training programs."³⁴ As a final omen, *AR 28-19* noted that "[l]ocal community/military domestic action councils may be constituted to plan possible projects, assess resources available, and determine methods of implementation."³⁵ These and other tenets of the DADAP would be resurrected in later civil-military programs.

Despite the many prophetic goals of DADAP, *AR 28-19* contained other provisions that were abandoned in later civil-military programs. Perhaps paramount among these provisions was a directive that DADAP was "a decentralized program designed to be implemented at installation and/or unit level."³⁶ Accompanying this devolution of control, no Army funds were expended for the DADAP program "other than those programmed and used for the training mission."³⁷ Commanders were merely "authorized and encouraged, within the constraints contained in [*AR 28-19*], to commit their resources to domestic action projects," including the use of assigned or attached personnel, fixed facilities, and transportation assets.³⁸ Finally, *AR 28-19* included an extensive section dealing with insurance and liability issues. This section included such topics as the Federal Tort Claims Act and formal releases from liability executed by the civilian organizations receiving Army assistance.³⁹ These liability issues inexplicably would not be addressed in the formal directives governing later civil-military programs.

Perhaps regrettably, the DADAP "had very little management emphasis from the Army's leadership," and as the Army increased its focus on military training in the 1980s, interest in DADAP waned.⁴⁰ Finally, on 1 May 1987, the Army ended the DADAP program and rescinded *AR 28-19*.⁴¹ However, "realizing some commands desire[d] to continue their domestic action programs," and noting that "implementation is at the local level," the Army suggested that local commands issue their own internal guidelines governing civil-military projects.⁴² In conjunction with this suggestion, the Army mandated that these local regulations must incorporate the following guidelines:

³³ *Id.* para. 4.

³⁴ *Id.* para. 5 (emphasis added).

³⁵ *Id.* para. 5.f.

³⁶ *Id.* para. 6. The decentralized character of the DADAP program became even more evident with the first change to *AR 28-19*. In a change effective 30 September 1976, individual commands were no longer required to submit an extensive report on DADAP projects to Army Headquarters via the chain of command. See U.S. DEP'T OF ARMY, REG. 28-19, DEPARTMENT OF THE ARMY DOMESTIC ACTION PROGRAM (C1, 31 Jan. 1977). With this change, higher headquarters no longer had a consistent method of monitoring the number and character of DADAP projects. This apparent disadvantage was corrected in the current IRT program. See *infra* notes 195-98 and accompanying text.

³⁷ *AR 28-19*, *supra* note 29, para. 5.q.2.

³⁸ *Id.* para. 6.

³⁹ See *id.* paras. 15-17. In the opinion of the author, the omission of similar provisions in later civil-military programs was a serious oversight. Liability issues, if anything, have grown more complicated in the twenty-six years since the inception of the DADAP program. Formal guidance on liability issues from the proponents of the current IRT program would certainly help to alleviate the larger concerns today. Liability issues surrounding IRT projects will be revisited in later sections of this article. See *infra* notes 165-168 and accompanying text.

⁴⁰ 138 CONG. REC. S8602 (daily ed. June 23, 1992) (statement of Sen. Nunn).

⁴¹ See Message, 091853Z Feb 97, Headquarters, Dep't of Army, DAMO-ODS (9 Feb 1997) [hereinafter DA Message 091853Z Feb 97]; Message, 301333Z Apr 87, Headquarters, Dep't of Army, DAMO-ODS (30 Apr 1987) [hereinafter DA Message 301333Z]; Message, 311520Z Jul 90, Headquarters, Dep't of Army, DAMO-ODS (31 July 1990) [hereinafter DA Message 311520Z Jul 90]. Another Army regulation still in existence, U.S. DEP'T OF ARMY, REG. 360-61, COMMUNITY RELATIONS (15 Jan. 1987), erroneously includes a provision (Section 12-1) that deals with the DADAP and makes reference to the rescinded *AR 28-19*.

⁴² DA Message 301333Z Apr 87, *supra* note 41.

- A. All support must fulfill valid training requirements.
- B. Support must be requested by responsible local officials and documentation must be presented certifying that no private or commercial source can provide the support requested from [the Department of Defense (DOD)].
- C. Potential private, commercial, state or local sources of support will be further screened by the installation to ensure that the Department of the Army is not in competition with commercial sources of support.
- D. Participation in domestic action projects must not selectively endorse, benefit, or favor any person, group, or corporation (whether profit or non-profit); religion, sect, religious or sectarian group, or quasi-religious or ideological movement; political organization; or commercial venture.
- E. Support will not impair accomplishment of the installation mission.
- F. Individual soldiers . . . must be performing in Military Occupational Specialty (MOS) code related or enhancing activities.
- G. Training benefits must accrue to the individuals involved.
- H. Requested support must be provided within existing funds used for training missions.
- I. Installation commanders will ensure that the local Staff Judge Advocate/Legal Counsel review all proposals.⁴³

Finally, the Army stressed once again in its guidance to local commands that “no DOD funds may be used to support” these projects unless “specifically appropriated or support is incidental to a legitimate DOD function such as training.”⁴⁴ Using these guidelines, local commands constructed their own domestic action programs until the arrival of a new DOD program in 1993. Again, many of the parameters of these locally-generated programs would greatly influence later civil-military programs.

The Civil-Military Cooperative Action Program (CMCAP)

In the summer of 1992, three individuals began to voice separate agendas that would one day meld into a new civil-military program. The first was Senator Sam Nunn (Democrat - Geor-

gia), then serving as Chairman of the Senate Armed Services Committee. In a speech to the Senate on 16 June 1992, Senator Nunn made the following comments:

[T]he end of the cold war has created a number of opportunities, as well as challenges for our Nation We are leaving a security era that demanded large numbers of U.S. combat forces stationed overseas or operating in forward locations at high states of combat readiness in order to confront a large and quantitatively superior opponent. That era has ended [T]here will be a much greater opportunity than in the past to use our military assets and training to assist civilian efforts in critical efforts in critical domestic areas I do not stand here today proposing any magic solution to the numerous problems we have at home. But I am convinced that there is a proper and important role the Armed Forces can play in addressing these pressing issues. I believe we can reinvigorate the military’s spectrum of capabilities to address such needs as deteriorating infrastructure, the lack of role models for tens of thousands, indeed hundreds of thousands, if not millions, of young people, limited training and education opportunities for the disadvantaged, and serious health and nutrition problems facing many of our citizens, particularly our children. There is a solid precedent for civil cooperation in addressing domestic problems [in the form of] Army Regulation 28-19 During markup of the National Defense Authorization Act for fiscal year 1993, I intend to offer a proposal to authorize the Armed Forces to engage in appropriate community service programs [T]he Armed Forces can assist civilian authorities in addressing a significant number of domestic problems.⁴⁵

Senator Nunn soon made good on his promise to introduce a new civil-military program. On 5 August 1992, when introducing the National Defense Authorization Act for Fiscal Year 1993 to the Senate, he noted that the bill—based on the recommendation of the Senate Armed Services Committee—contained “a provision that would establish a Civil-Military Cooperative Action Program[, which] would build upon a variety of past DOD efforts to develop programs that are consistent

43. DA Message 311520Z Jul 90, *supra* note 41. This 1990 message largely repeated the guidance contained in DA Message 301333Z Apr 87, *supra* note 41.

44. DA Message 301333Z Apr 87, *supra* note 41. Once again, the Army acknowledged the importance of both the Posse Comitatus Act and the Stafford Act by noting that “[r]equests for assistance from . . . civil law enforcement agencies, and in response to domestic or manmade disasters are addressed in separate DOD directives and implementing regulations.” DA Message 311520Z Jul 90, *supra* note 41. See also *supra* note 7.

45. 138 Cong. Rec. S8602 (daily ed. June 23, 1992) (statement of Sen. Nunn).

with the military mission and that can assist in meeting domestic needs."⁴⁶ He also noted that the proposed "program would be structured to fill needs not otherwise being met, and to provide this assistance in a manner that does not compete with the private sector or with services provided by other Government agencies."⁴⁷

A second famous voice, the Reverend Jesse Jackson, echoed similar concerns, though at first his idea had nothing to do with the military. During the summer of 1992, Reverend Jackson began trumpeting what he called a "Rebuild America" plan to help poor and disadvantaged citizens as well as rebuild the nation's infrastructure.⁴⁸ His plan proposed the creation of a one trillion dollar development bank that would—among other things—be aimed at building bridges and railroads.⁴⁹ Reverend Jackson urged all of the major 1992 presidential candidates (President George Bush, Governor Bill Clinton, and Ross Perot) to embrace his plan.⁵⁰

On 23 October 1992, Senator Nunn got his wish when the National Defense Authorization Act for Fiscal Year 1993⁵¹

passed both houses of Congress. The Act, in section 1081, formally established the Civil-Military Cooperative Action Program (CMCAP).⁵² The CMCAP would soon be codified temporarily in 10 U.S.C. § 410.⁵³

The CMCAP accompanied a list of findings justifying the initiation of the new program. Most of these findings echoed the sentiments of Senator Nunn in his earlier statements on the subject.⁵⁴ The objectives of the CMCAP as formally announced by Congress were amazingly similar to the Army's earlier DADAP, which was not surprising considering Senator Nunn's specific reference to that now-defunct program when he introduced the CMCAP concept.⁵⁵ The congressional language governing CMCAP even encouraged the use of diverse geographic advisory councils on civil-military cooperation, much as the earlier DADAP program had.⁵⁶ Beyond these broad findings and objectives, however, the statute implementing CMCAP contained little guidance for the military services; in particular, the statute did not address funding of the CMCAP program at all, a problem that would obviously vex the military services and individual commands in the ensuing years.⁵⁷

46. 138 CONG. REC. S11826 (daily ed. Aug. 7, 1992) (statement of Sen. Nunn). See also S. REP. NO. 102-352 (1992).

47. 138 CONG. REC. S11826.

48. See *Jesse Jackson to Push "Rebuild America" Plan at Democratic National Convention*, N.Y. VOICE, July 4, 1992, at 1. The term "Rebuild America" and accompanying goals were not invented by Reverend Jackson, however. Independent from Reverend Jackson, the "Rebuild America Coalition" was founded in 1987 and is composed of a broad group of national public and private organizations committed to the infrastructure challenge—reversing the decline in America's investment in infrastructure and bringing infrastructure investment back to the top of the national agenda." Rebuild America Coalition, *Who We Are—Rebuild America Coalition*, at <http://www.rebuildamerica.org/about/index.html> (last visited Apr. 25, 2000).

49. See *Jesse Jackson to Push*, *supra* note 48, at 1.

50. See *id.*

51. Pub. L. No. 102-484, 106 Stat. 2575 (1992).

52. *Id.* § 1081 (codified at 10 U.S.C. § 410 (1995) (repealed by Pub. L. No. 104-106, § 571(a)(2), 110 Stat. 353 (1996)). The CMCAP appears to be consistent with the broad, post-Cold War goals of the National Defense Authorization Act for Fiscal Year 1993, for the preamble to the Act noted one of its objectives was "[t]o authorize appropriations . . . for defense conversion." *Id.*

53. See *id.*

54. In hindsight, one of the congressional findings turned out to be overly optimistic:

As a result of the reductions in the Armed Forces resulting from the ending of the Cold War, the Armed Forces will have fewer overseas deployments and lower operating tempos, and there will be a much greater opportunity than in the past for the Armed Forces to assist civilian efforts to address critical domestic problems.

Id. § 1081(a)(3), 106 Stat. at 2514. The next few years would actually involve an *increase* in overseas deployments and operating tempos, in such hot spots as Somalia, Haiti, Bosnia, and Kosovo. See GAO LETTER REP. NO. GAO/NSAID-96-105, *MILITARY READINESS: A CLEAR POLICY IS NEEDED TO GUIDE MANAGEMENT OF FREQUENTLY DEPLOYED UNITS* (Apr. 8, 1996), available at <http://www.fas.org/man/gao/ns96105.htm>.

55. The verbatim "Program Objectives" of the CMCAP were as follows:

- (1) To enhance individual and unit training and morale in the armed forces through meaningful community involvement of the armed forces.
- (2) To encourage cooperation between civilian and military sectors of society in addressing domestic needs.
- (3) To advance equal opportunity.
- (4) To enrich the civilian economy of the United States through education, training, and transfer of technological advances.
- (5) To improve the environment and economic and social conditions.
- (6) To provide opportunities for disadvantaged citizens of the United States.

10 U.S.C. § 410(b)(1) (repealed 1996). Compare these objectives with the verbatim goals of the Army's earlier DADAP program, *supra* note 33 and accompanying text.

Instead, the statute directed the Secretary of Defense to issue more detailed DOD regulations governing the program,⁵⁵ a process that would end up taking several years to accomplish.⁵⁹

At about the same time that the CMCAP legislation was winding its way through Congress, a third personality appeared on the scene trumpeting what would eventually give rise to the comprehensive DOD CMCAP program. In the autumn of 1992, then-presidential candidate Bill Clinton—responding to Jesse Jackson’s persistent plea to all of the major candidates—increasingly embraced the “Rebuild America” concept.⁶⁰ Upon his election to the presidency in November 1992, he began to offer more concrete terms for the concept, including a proposal for a \$200 billion fund to rebuild America’s infrastructure.⁶¹ As part of the Rebuild America program, President Clinton soon challenged DOD to search for projects that would both serve American communities in need and provide military training to

its units and service members.⁶² He also suggested three areas in which DOD resources would be particularly appropriate—health care, infrastructure support, and youth training programs.⁶³ Though some were extremely critical of President Clinton’s Rebuild America concept,⁶⁴ local communities across the nation quickly lined up to receive benefits under the proposed program.⁶⁵

In May 1993, the first CMCAP project was accomplished, a joint effort between the State of Texas (through its Department of Health) and the U.S. Army (including active Army, Army Reserve, and Texas Army National Guard assets) to provide medical services for impoverished civilians.⁶⁶ The Army, in its after action reports, indicated that the “exercise was an excellent training vehicle” and viewed projects of this type as “valuable for both [the Army] and the nation.”⁶⁷ In analyzing the lessons learned from this initial project, the Army also

56. See *id.* Continuing the inheritance from the DADAP program, the CMCAP also paid homage to the Posse Comitatus Act, noting that it should not be “construed as authorizing . . . the use of the armed forces for civilian law enforcement purposes.” *Id.* § 410(e)(1).

57. See, e.g., Message, 071345Z Feb 94, Commander, U.S. Army Forces Command (FORSCOM), to Dep’t of Army Headquarters, Washington, D.C., subject: Civil Military Cooperative Action Programs (7 Feb. 1994) (“Request Departmental guidance concerning recurring initiatives for civil-military cooperative action. The Civil-Military Cooperative Action Program was established by the Defense Authorization Act of 1993. . . . FORSCOM is not aware of any current policy guidance or any funding allocation from DOD for this program . . .”).

58. See 10 U.S.C. § 410(b)(1). The statute did place some restrictions on the required DOD regulations, however:

The regulations shall include the following:

- (1) Rules governing the types of assistance that may be provided.
- (2) Procedures governing the delivery of assistance that ensure, to the maximum extent practicable, that such assistance is provided in conjunction with, rather than separate from, civilian efforts.
- (3) Procedures for appropriate coordination with civilian officials to ensure that the assistance —
 - (A) meets a valid need; and
 - (B) does not duplicate other available public services.
- (4) Procedures for the provision of assistance in a manner that does not compete with the private sector.
- (5) Procedures to minimize the extent to which Department of Defense resources are applied exclusively to the program.
- (6) Standards to ensure that assistance is provided . . . in a manner that is consistent with the military mission of the units of the armed forces involved in providing the assistance.

Id. § 410(d)(1).

59. Indeed, though a draft version of the regulations would be eventually written, completion of the formal version would not be accomplished before the CMCAP was eventually replaced with the IRT program. However, the draft regulations for the CMCAP program would largely be recycled and finally formalized for the IRT program. See *infra* notes 96-101 and accompanying text for a discussion of the development of DOD regulations for the IRT program.

60. See IRT Web Site, *supra* note 6.

61. See *Clinton’s RAF Spurs Questions*, DAILY OKLAHOMAN, Dec. 7, 1992, at 8; William Petroski, *Harkin Sees Opportunity in Clinton’s Rebuild America Plan*, DES MOINES REG., Nov. 5, 1992.

62. See IRT Web Site, *supra* note 6.

63. See *id.*

64. See *Clinton’s RAF Spurs Questions*, *supra* note 61.

65. See *MTC: Bay Area Readies for Clinton’s “Rebuild America” Program*, PR NEWswire, Dec. 15, 1992; Petroski, *supra* note 61; Laura Placbecki, *City Seeks Clinton Task Force Money to Build Local Projects*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Jan. 20, 1993, at 2N1; Martin Tolchin, *Mayors Press Clinton on Promise to Rebuild Nation*, N.Y. TIMES, Jan. 25, 1993, at A15.

66. See Letter, Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs to Commander, U.S. Army Forces Command, subject: Support of Texas Department of Health Request for Civil-Military Cooperative Action Program (19 Aug. 1993) (on file with author).

67. *Id.*

expressed its hope that the CMCAP process could be more formalized, and noted a need for policies that would standardize the accomplishment of individual projects.⁶⁸ The call was obviously out for more specific DOD guidance on how to implement the CMCAP program beyond the broad congressional guidelines.

Responding to this need, in June 1993 the Assistant Secretary of Defense for Reserve Affairs (ASD-RA) established a Directorate for Civil-Military Programs to coordinate with the various components of DOD and to provide guidelines for the CMCAP program.⁶⁹ In quick order, the new directorate asked the individual services to develop their own programs consistent with the CMCAP concept, and also asked the two-star chiefs of each service's Reserve component to serve as a General Officer Steering Committee for CMCAP.⁷⁰ Finally, the directorate asked these same Reserve chiefs to appoint members at the colonel and Navy captain level to serve on a Senior Working Group, which eventually met regularly from October through December 1993 with the following verbatim tasks:

1. Looking at the armed forces' past experience with civil-military projects, both [within the United States and overseas];
2. Examining existing resources and capabilities upon which we might capitalize;
3. Identifying parameters for new programs based upon this information; and
4. Developing new ideas for potential programs through which our armed forces could address domestic needs while simultaneously enhancing readiness. The focus was on quality, not quantity.⁷¹

68. *See id.*

69. *See* IRT Web Site, *supra* note 6. Establishment of this directorate was eventually endorsed by the Deputy Secretary of Defense. *See* Memorandum from William J. Perry, Deputy Secretary of Defense, to Assistant Secretary of Defense for Personnel and Readiness, subject: Civil-Military Cooperative Action Program (Nov. 16, 1993). Endorsement of the new directorate at the highest levels of DOD was one of the recommendations of the Senior Working Group, which would soon follow establishment of the directorate. *See infra* notes 71-72 and accompanying text.

70. *See* IRT Web Site, *supra* note 6.

71. *Id.*

72. *See id.*

73. Issued jointly as U.S. DEP'T OF ARMY, FIELD MANUAL 100-19, DOMESTIC SUPPORT OPERATIONS (1 July 1993) [hereinafter FM 100-19] and U.S. MARINE CORPS, FLEET MARINE FORCE MANUAL 7-10, DOMESTIC SUPPORT OPERATIONS (1 July 1993) [hereinafter FMFM 7-10]. Readers should note that FM 100-19 and FMFM 7-10 are still in effect as of this writing and serve as valuable resources for units wishing to pursue IRT projects.

74. "Community assistance activities . . . positively influence public opinion . . . while also enhancing the combat readiness of the organization." *Id.* at 8-1.

75. *See, e.g.,* Bob Haas, *Army Mission: Medicine*, USA TODAY, Mar. 11, 1994.

76. *See, e.g.,* Message, 071345Z Feb 94, Commander, U.S. Army Forces Command (FORSCOM), to Dep't of Army Headquarters, Washington, D.C., subject: Civil-Military Cooperative Action Programs (7 Feb. 1994) ("Request Departmental guidance concerning recurring initiatives for civil-military cooperative action. The Civil-Military Cooperative Action Program was established by the Defense Authorization Act of 1993. . . . FORSCOM is not aware of any current policy guidance or any funding allocation from DOD for this program . . .").

77. *See* Memorandum from Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs to Military Services, subject: Draft Directive and Instruction on Civil-Military Programs (8 Sept. 1994).

The Senior Working Group eventually made recommendations that would help DOD regulate the CMCAP program for the next few years.⁷²

In conjunction with the arrival of the CMCAP program, and responding to the Directorate for Civil-Military Program's call for the individual services to establish their own programs consistent with CMCAP, the Army and Marine Corps jointly published identical manuals entitled *Domestic Support Operations*.⁷³ Chapter 8 of these manuals, entitled *Community Assistance*, paralleled the goals of the CMCAP program⁷⁴ while simultaneously providing more detailed guidance to units wishing to undertake such projects.

By early 1994, other CMCAP projects had been accomplished, and positive publicity followed the units participating in them.⁷⁵ As a result, requests for assistance began to increase. Despite such helpful developments as the guidelines provided by the Senior Working Group and the Army's and Marine Corps' domestic support operations manuals, the services began to request even more formal guidance from DOD on how to handle these new requests.⁷⁶ Accordingly, in September 1994, DOD forwarded a draft directive and instruction on civil-military programs to the individual services for comment; the services in turn disseminated the draft document down the chain of command for similar feedback.⁷⁷ At the same time, DOD continued its internal assessment of the CMCAP program, noting several improvements that could be implemented, including:

Development of project selection criteria which focus on training to guide the services in establishing and implementing projects;

[d]evelopment of a business case to establish [CMCAP] projects as an alternative and enhancement to regular training activities; [d]evelopment of performance measures to measure success; and [i]dentification of information requirements for program oversight, resource stewardship, and reporting responsibilities.⁷⁸

With these improvements, DOD hoped that “[t]he services [would] have uniform guidelines in selecting, planning, executing, and evaluating [CMCAP] programs, leading to enhanced readiness.”⁷⁹ Notwithstanding these efforts to standardize and improve the efficiency of the program, imminent political developments—most notably the Congressional elections of 1994—would soon bring an end to CMCAP.

The Innovative Readiness Training (IRT) Program

The Arrival of 10 U.S.C. § 2012

Despite the noble goals of the CMCAP program, a major shortcoming in its basic premise began to emerge. While the statute establishing CMCAP “required DOD to ensure that it provided the assistance in a manner consistent with the military mission of the units involved, the statute did not require an assessment of the training value of providing the assistance.”⁸⁰ As a result, CMCAP proved to be controversial, with both military and civilian commentators questioning the propriety of the entire program.⁸¹ One pundit neatly summed up the harsh criticism:

[T]he program weakens the armed forces by diverting time and training to social do-good that is none of the military’s function

By relying on military institutions to perform welfare functions, the administration is not only trying to sneak the welfare state into the armed services but also is trying to use the armed services to import a military structure into the civilian welfare state. The program is thus more appropriate to the regime of North Korea than to a constitutional democracy, and for that reason alone it ought to be abolished.⁸²

In 1994, the Republican Party took control of both houses of Congress, and the growing criticism of the CMCAP program began to find sympathy among the new leaders in the legislature.⁸³ By the spring of 1995, a house committee vote threatened to kill the entire CMCAP program.⁸⁴ Responding to this threat, Assistant Secretary of Defense Deborah Lee wrote letters to each of the armed services urging support for the CMCAP program.⁸⁵ Her comments included the following: “I am committed to civil-military programs because I know how effective they are -we are fulfilling a commitment to help ‘rebuild America’ and encourage public service but most importantly we are providing our military personnel valuable ‘hands on’ training opportunities that enhance readiness.”⁸⁶ The original champion of CMCAP, Senator Nunn, also rose in defense of the program by making comments before the Senate.⁸⁷ Other senators, especially those whose constituents ostensibly benefited the most from CMCAP

78. THE ASSISTANT SECRETARY OF DEFENSE (RESERVE AFFAIRS), U.S. DEP’T OF DEFENSE, STRATEGIC ASSESSMENT OF THE CIVIL-MILITARY COOPERATIVE ACTION PROGRAM (nd), available at <http://www.c3i.osd.mil/bpr/bprcd/3402.htm>.

79. *Id.*

80. GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), available at <http://www.fas.org/man/gao/nsiad98084.htm>. The primary motivation behind the CMCAP program is perhaps illustrated by the placement of 10 U.S.C. § 410 under a chapter entitled “Humanitarian and Other Assistance.”

81. *See, e.g., Chores for the U.S. Army?*, WASH. TIMES, May 28, 1995, at B2; Davis, *supra* note 4, at 74; Dunlap, *supra* note 4, at 359.

82. *Chores for the U.S. Army?*, *supra* note 81.

83. The debate over the CMCAP program appears to be part of a wider political debate over the proper role of the military that took place in 1995-96. The wider debate examined such issues as the use of the military for drug interdiction, with presidential candidate Bob Dole pledging an increase in the use of the armed services in the war on drugs and the use of troops for border patrol, and presidential candidate Lamar Alexander calling for the creation of a new branch of the armed forces that would replace the Immigration and Naturalization Service and the Border Patrol, *see* Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U.L.Q. 953, 954 (1997). A particularly sticky issue arose with the DOD joint task force for the 1996 Olympics in Atlanta. Approximately 13,000 troops were deployed for the Olympics at a cost to taxpayers of \$51 million. *See* John J. Fialka, *Join the Army to See the World: Drive Athletes Around Atlanta*, WALL ST. J., June 12, 1996, at B1. Not all of the troops were used for security purposes; some were used for such mundane tasks as watering field-hockey arenas and driving buses, which led Senator John McCain (Republican-Arizona) to call the assignments “demeaning and degrading” to the troops. *Id.*; *see also* Business, *Capitol Hill Question Military’s Role in Olympics*, DEF. WEEK, July 22, 1996. Newspaper editorials around the nation were generally very critical of the role played by the military in the 1996 Olympics. *See, e.g., Atlanta Storm*, RICHMOND TIMES-DISPATCH, June 24, 1996, at A6; *Olympic Personnel Carriers*, ST. PETERSBURG TIMES, May 23, 1996, at 14A. Understanding this wider debate may shed light on the political developments that gave rise to the current IRT program.

84. *See Chores for the U.S. Army?*, *supra* note 81.

85. *See id.*

projects, also spoke up in vehement support to continue the program.⁸⁸

Despite the outcry from these sources, other highly respected political leaders soon expressed concerns about the CMCAP program. Among them was Senator John McCain, who stated the following in remarks to the Senate supporting modification of CMCAP:

I am concerned when scarce defense dollars are earmarked for these programs that do not significantly enhance national security I urge the Department of Defense to refrain from requesting funds for these programs in the future since there are so many more pressing military requirements that continue to go unfunded. It is my hope that these programs will continue to provide valuable services to local communities using funds that are more appropriate to their mission.⁸⁹

Eventually, the Senate Armed Services Committee (SASC), in hammering out the DOD budget for Fiscal Year 1996, addressed the growing debate over the CMCAP program. Instead of initially proposing a complete end to the CMCAP program, however, the SASC merely proposed modifications such as restricting the program to the Reserve components, eliminating federal agency labor unions from participation in the advisory councils, and removing management of the program from the ASD-RA.⁹⁰ Even these proposed amendments were the subject of intense discussion in the Senate.⁹¹ Eventually, as part of the National Defense Authorization Act for Fiscal Year 1996,⁹² Congress passed a compromise measure abolishing the CMCAP program by repealing 10 U.S.C. § 410

and replacing it with 10 U.S.C. § 2012, the Innovative Readiness Training (IRT) program.

Implementation of 10 U.S.C. § 2012 and the Accompanying Regulatory Guidelines

The biggest change from the CMCAP to the IRT program was a new requirement that any civil-military project must first and foremost involve a strong relationship to military training, a topic that will be revisited in greater detail in the next section of this article. Two other mandates in the IRT enabling statute quickly became evident as well. The first was a termination of funding for a centralized office dealing with civil-military programs within the Office of the ASD-RA.⁹³ This would mean an end to the formal Directorate of Civil-Military Programs that had attempted to formulate policies for the CMCAP program.⁹⁴ In conjunction with the demise of a central supervision and policy-making office, the enabling statute mandated that “[t]he Secretary of Defense . . . prescribe regulations governing the provision of assistance” under the IRT program. Congress placed restrictions on these future regulations much as it had done with the CMCAP program.⁹⁵

The regulation which sprang from this mandate, *DOD Directive 1100.20*, assigned the ASD-RA the responsibility to, among other things, “[d]evelop, coordinate, and oversee the implementation of DOD Policy for IRT activities conducted under [10 U.S.C. § 2012,] . . . [s]erve as focal point for all IRT activities[, and] . . . [m]onitor IRT activities.”⁹⁶ Despite this delegation, the regulation also sought to guide military organizations entering into projects with civilian organizations under 10 U.S.C. § 2012 and established specific processes to ensure the projects would be in conformity with the statute.⁹⁷ The reg-

86. *Id.*

87. See 141 CONG. REC. S11557 (daily ed. Aug. 5, 1995) (statement of Sen. Nunn) [hereinafter Sen. Nunn 1995 Statement].

88. See 141 CONG. REC. E1745 (daily ed. Sept. 8, 1995) (statement of Sen. Johnson) (noting the benefits of CMCAP to Indian reservations within Senator Johnson's home state of South Dakota).

89. 141 CONG. REC. S11557 (daily ed. Aug. 5, 1995) (statement of Sen. McCain).

90. See 141 CONG. REC. S11557 (statement of Sen. Nunn).

91. See *id.*

92. Pub. L. No. 104-106, § 572(a)(1), 110 Stat. 353 (1996).

93. This provision does not appear in the codified version of the IRT statute. It may be found by referencing the original session law, Pub. L. No. 104-106, § 574, 110 Stat. 356 (1996), or by reading the notes following 10 U.S.C. § 2012 in an annotated version of the *U.S. Code*. The exact language of this provision is as follows:

No funds may be obligated or expended after the date of the enactment of this Act (1) for the office that as of the date of the enactment of this Act is designated, within the Office of the Assistant Secretary of Defense for Reserve Affairs, as the Office of Civil-Military Programs, or (2) for any other entity within the Office of the Secretary of Defense that has an exclusive or principle mission of providing centralized direction for activities under section 2012 or title 10, United States Code

10 U.S.C.S. § 2012 (2000) (History: Ancillary Laws and Directives).

94. This is not to say that civil-military programs do not get high-level supervision. A two-star general is still listed as the supervisor of these programs. See U.S. Air Force, *Biographies*, at http://www.af.mil/news/biographies/andrews_je.html (last visited July 16, 2001) (biography of Major General James E. Andrews, USAF).

ulation also required the individual "Secretaries of the Military Departments" to "[p]romulgate guidance consistent with the policies and guidance provided within [*DOD Directive 1100.20*]."98 Responding to this requirement, the Air Force published its own internal IRT regulation on 1 March 1999.⁹⁹ The Navy followed with its internal IRT regulation on 4 November 1999.¹⁰⁰ Finally, the Army published its internal guidelines on 28 March 2000.¹⁰¹

Despite the seemingly positive developments that began to unfold following passage of § 2012, Congress once again began to amend the entire program. In November 1997, as part of the National Defense Authorization Act for Fiscal Year 1998, Congress tasked the General Accounting Office (GAO) with reviewing the IRT program.¹⁰² The GAO's final report was not flattering.¹⁰³ For example, it concluded that:

DOD does not know the full extent and nature of the [IRT] Program because some project information is not consistently compiled and reported. Furthermore, although DOD knows the amount of supplemental

funds spent on the program, it does not know the full cost of the program because the services and components do not capture these costs, which are absorbed from their own appropriations.¹⁰⁴

The GAO report also criticized *DOD Directive 1100.20* for failing to provide additional guidance for military organizations to use in meeting the statutory requirement that the provision of assistance not result in a significant increase in the cost of the training.¹⁰⁵ Finally, the report noted that in some cases individual IRT tasks were not related to military specialties; thus, it appeared that the goal of completing a project sometimes took priority over the goal of providing valid military training.¹⁰⁶

Congress was not the only body doing follow-up reviews of the IRT program. For example, the Army Internal Review Office conducted its own audit of the Army IRT program in Fiscal Year 1998.¹⁰⁷ The findings of this audit were also critical, noting "cost over runs and disallowed charges totaling over \$63,000."¹⁰⁸ The Army auditors made recommendations aimed

95. Actually, the IRT regulatory restrictions enacted by Congress were virtually identical to the earlier CMCAP restrictions. See *supra* note 58 and accompanying text. The only differences being that first, while the CMCAP statute required regulations with "[p]rocedures to minimize the extent to which Department of Defense resources are applied exclusively to the program," the IRT statute required regulations with "[p]rocedures to ensure that Department of Defense resources are not applied exclusively to the program receiving the assistance," and second, because the IRT statute contained a separate provision requiring a direct link to valid military training, it skipped the CMCAP requirement that future regulations would include "[s]tandards to ensure that assistance is provided . . . in a manner that is consistent with the military mission" of the units providing the assistance. Compare 10 U.S.C. § 410 (1995) (repealed 1996) with 10 U.S.C. § 2012(f) (2000) (emphasis added).

96. DOD DIR. 1100.20, *supra* note 5, at 6.

97. See GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), available at <http://www.fas.org/man/gao/nsiad98084.htm>.

98. DOD DIR. 1100.20, *supra* note 5, at 7.

99. See U.S. DEP'T OF AIR FORCE, INSTR. 36-2250, CIVIL-MILITARY INNOVATIVE READINESS TRAINING (IRT) (1 Mar. 1999) [hereinafter AFI 36-2250].

100. See U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1571.1, INNOVATIVE READINESS TRAINING (IRT) IN SUPPORT OF ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE (4 Nov. 1999) [hereinafter OPNAVINST 1571.1]. This regulation applies only to the Navy, and not to the Marine Corps. Readers should note that the Marine Corps had earlier published *FMFM 7-10*, which dealt with civil-military programs. This manual is still in effect and serves as the Marine Corps' internal guidance. See *supra* note 73 and accompanying text.

101. Memorandum from the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, subject: Innovative Readiness Training (IRT) (28 Mar. 2000) [hereinafter Army IRT Policy Memorandum]. Readers should note that the Air Force, Navy, and Army internal guidelines are all available at the IRT Web Site, *supra* note 6. As a final note on the individual service regulations, *DOD Directive 1100.20* itself notes that the IRT program also "applies to . . . the Coast Guard, by agreement with the Department of Transportation, when it is not operating as a Military Service in the Department of the Navy." See DOD DIR. 1100.20, *supra* note 5, at 2.

102. See Pub. L. No. 105-85, § 595, 111 Stat. 1765 (1997).

103. See GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), available at <http://www.fas.org/man/gao/nsiad98084.htm>.

104. *Id.*

105. See *id.*

106. See *id.*

107. See OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY, FINANCIAL MANAGEMENT AND COMPTROLLER, SYNOPSIS OF SIGNIFICANT INTERNAL REVIEW REPORTS FY98—VOLUME II, ARMY INTERNAL REVIEW: INNOVATIVE READINESS TRAINING (nd), available at <http://www.asafm.army.mil/ir/synopsis/fy98/fy98synv2.htm> (last visited Aug. 17, 1999).

at "assist[ing] local command[s] in tracking authorized expenses and improving overall project management."¹⁰⁹

In response to these revelations, the ASD-RA issued two memorandums attempting to provide additional IRT guidance to the military services—particularly in the areas of funding, eligible civilian organizations, and training issues.¹¹⁰ This was not the end of the matter, however, for Congress also responded to the GAO report by amending 10 U.S.C. § 2012 on 17 October 1998.¹¹¹ The amendment added a new section to the IRT statute requiring such measures as after-action reports on all projects, formal certification that each project "would not result in a significant increase in the cost of training,"¹¹² and more stringent cost accounting.

Understanding the IRT Statutory and Regulatory Guidelines: A Practical Guide for Commanders and Attorneys

Despite the sometimes hectic pace of changes to civil-military programs in general, and the current IRT program in particular, the program has enjoyed some great successes. Military units across the country have participated in projects that have garnered overwhelmingly positive publicity in local, national, and internal media outlets.¹¹³ Some of these projects have

involved extended "umbrella" projects that have stretched over several years and have involved cooperation with other military services, as well as other government agencies. Examples include *Operation Walking Shield*,¹¹⁴ *Coastal America*,¹¹⁵ and *Operation Alaskan Road*.¹¹⁶

Despite the wonderful opportunities offered by these projects, weeding through the IRT statutory and regulatory guidelines can be a daunting task, especially when one considers the many changes the program has undergone. Most military attorneys are unfamiliar with the legal guidelines that govern the program, yet often find themselves having to tackle a legal review of an IRT project on short notice. Add to this the high level of political interest in such projects,¹¹⁷ and military attorneys face a tough burden. Mastering the complex legal guidelines is therefore critical to an assessment of a particular IRT project. This can be simplified by boiling the IRT legal issues down to fourteen questions that commanders and lawyers should consider when reviewing the propriety of IRT projects. Most of these fourteen issues are addressed in the IRT statute or governing regulations, while a few of them concern basic legal concepts that should not be ignored. By properly addressing these questions, commanders and their supporting attorneys can ensure that IRT projects will survive later scrutiny.

108. *Id.*

109. *Id.*

110. See Memorandums, Assistant Secretary of Defense for Reserve Affairs, subject: Policy Memorandum for Department of Defense (DOD) Innovative Readiness Training (DOD Dir. 1100.20, "Support and Services for Eligible Organizations Outside the Department of Defense") (21 Aug. 1998 and 13 July 1999) [hereinafter ASD-RA IRT Policy Memorandum No. 1 and ASD-RA IRT Policy Memorandum No. 2], available at IRT Web Site, *supra* note 6.

111. See Pub. L. No. 105-261, § 525(b), 112 Stat. 2014 (1998).

112. 10 U.S.C. § 2012(j)(3) (2000).

113. See, e.g., *Just in Time for Holiday: Cooperative Effort Brings Safe Water Supply to Brundage Colonia*, Dec. 21, 1998 (press release from the Texas Natural Resource Conservation Commission), available at <http://www.tnrcc.state.tx.us/exec/media/press/12-98brundage.html>; Kozaryn, *supra* note 6; Lieutenant Don Marconi, *Naval Reserve Seabees Deploy to Alaska for Readiness Training*, NAVAL RESERVIST NEWS, Oct. 1999, at 5; *Marines Find Unrelenting Foe in Island Road Hurdles*, ANCHORAGE DAILY NEWS, Aug. 11, 1998 (Associated Press release), available at <http://www.adn.com/stories/T98081168.html>; Lieutenant Colonel Randy Pullen, *Dental and Veterinarian Teams at Work*, THE OFFICER, Oct. 1999, at 56; *Reservists Train While Building Low-Income Housing*, A.F. NEWS, Sept. 18, 2000, available at http://www.af.mil/news/Sep2000/n20000918_001430.html.

114. Conceived and developed by the Walking Shield American Indian Society for helping to improve the quality of life among Native American people who live on our nation's Indian reservations, while at the same time providing important military training for military Reserve personnel who are involved with the program. See IRT Web Site, *supra* note 6 (containing information about this and other umbrella projects).

115. Provides a forum for interagency collaborative action and a mechanism to facilitate regional action plans to protect, preserve, and restore the nation's coastal living resources. See *id.* For further information about the *Coastal America* program, please visit the website dedicated to this program at <http://www.coastalamerica.gov/text/irt/html>.

116. A joint military and community project in the state of Alaska to construct a fourteen-mile road on Annette Island linking the town of Metlakatla to the north side of the island. See IRT Website, *supra* note 6.

117. For example, in 1999, the city of New York requested IRT medical support for the New York City Marathon. The letter requesting support was personally signed by Mayor Rudolph Giuliani. See Letter, New York Mayor Rudolph Giuliani to Major General William J. Collins, Commanding General, 77th Regional Support Command (Aug. 16, 1999) (on file with author). Also in 1999, DOD IRT participation in the Department of Veterans Affairs (VA) White House Millennium Project—a year-long effort to provide medical care and other services to homeless veterans—was largely initiated by an exchange of letters between the VA's Assistant Secretary for Public and Intergovernmental Affairs and the ASD-RA. See Letter, Mr. John Hanson, Assistant Secretary of Veterans Affairs for Public and Intergovernmental Affairs, to Mr. Charles Cragin, Assistant Secretary of Defense for Reserve Affairs (Aug. 19, 1999), and Mr. Cragin's Reply Letter (Aug. 31, 1999).

1. Have You Consulted the Proper Legal Guidelines?

Whenever conducting a review of a proposed IRT project, it is imperative to consult the controlling legal authorities up front. The starting point should always be the IRT enabling statute, 10 U.S.C. § 2012, followed by *DOD Directive 1100.20*. Along with this directive, it is important to consult the additional DOD-level guidance provided in the two policy memorandums issued by ASD-RA.¹¹⁸ Finally, judge advocates should look to their individual service's regulations dealing with IRT.¹¹⁹ All of these, with the exception of *FM 100-19* and *FMFM 7-10*, are available on the DOD IRT Website.¹²⁰

- (i) The Special Olympics.
- (j) The Campfire Boys.
- (k) The Campfire Girls.
- (l) The 4-H Club.
- (m) The Police Athletic League.]

2. Is the Requesting Organization Eligible for IRT Support?

Section 2012(e) of the IRT statute is quite clear on which outside entities are eligible for IRT support, stating:

The following organizations and activities are eligible for assistance . . . :

- (1) Any Federal, regional, State, or local government entity.
- (2) Youth and charitable organizations specified in section 508 of title 32. [The eligible youth and charitable organizations listed in 32 U.S.C. 508(d) are:
 - (a) The Boy Scouts of America.
 - (b) The Girl Scouts of America.
 - (c) The Boys Clubs of America.
 - (d) The Girls Clubs of America.
 - (e) The Young Men's Christian Association.
 - (f) The Young Women's Christian Association.
 - (g) The Civil Air Patrol.
 - (h) The United States Olympic Committee.

- (3) Any other entity as may be approved by the Secretary of Defense on a case-by-case basis.¹²¹

A few notes about these categories are in order. The first category listed broadly allows support to any government entity in the nation. The second category incorporates by reference a similar statute applying to the National Guard. Organizations falling under the first or second categories need only submit the formal request for assistance noted below. If an organization does not fit into the first or second category, the third category allows other entities to request IRT support on a case-by case basis. Any requesting organization or activity, regardless of category, should forward a formal request on official letterhead paper, signed by a responsible official of that organization, to the military unit that the support is requested from.¹²² Requests for support under the third category must be forwarded with the IRT packet to the Office of the Assistant Secretary of Defense,¹²³ and must be accompanied by a copy of the requesting organization's bylaws, and evidence of the organization's non-profit tax status; tax documents that are more than ten years old must have a recertification letter as well.¹²⁴

As a final note, when tackling any IRT project, the military unit involved must ensure that "[r]esources of the Military Departments are not applied exclusively to the program receiving the assistance, and that neither endorsement nor preferential treatment is given to any non-Federal entity as provided in [the *Joint Ethics Regulation*.] *DoD 5500.7-R*."¹²⁵ This would preclude, for instance, the use of the participating military unit's name in advertising a non-profit cause for which IRT support was provided.

118. See *supra* note 110 and accompanying text.

119. See Army IRT Policy Memorandum, *supra* note 101; FM 100-19, *supra* note 73, ch. 8 (Army); AFI 36-2250, *supra* note 99 (Air Force); OPNAVINST 1571.1, *supra* note 100 (Navy); FMFM 7-10, *supra* note 73, ch. 8 (Marine Corps).

120. IRT Web Site, *supra* note 6. *Field Manual 100-19* and *FMFM 7-10* are available at <http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/100-19/fm10019.htm>.

121. 10 U.S.C. § 2012(e) (2000).

122. See *id.* § 2012(e)(1); DOD DIR. 1100.20, *supra* note 5, at 3; IRT Web Site, *supra* note 6. "Responsible official" is defined as "an individual authorized to represent the organization or activity regarding the matter of assistance to be provided." DOD DIR. 1100.20, *supra* note 5, at 3-4.

123. The authority to approve these requests on a case-by case basis has been delegated from the Secretary of Defense to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), and from USD(P&R) to the ASD-RA. See DOD DIR. 1100.20, *supra* note 5, at 6, 11.

124. See ASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

125. DOD DIR. 1100.20, *supra* note 5, at 5.

3. Is the IRT Project Geographically Located at a Site Eligible for IRT Support?

There are two sub-issues here. First, *DOD Directive 1100.20* strictly limits IRT projects to the following geographic areas: "[T]he United States, its territories and possessions, and the Commonwealth of Puerto Rico."¹²⁶ This would preclude IRT projects conducted while on deployment to foreign nations, though other programs might very well be able to accomplish the same thing.¹²⁷ Second, the definition of IRT from this same directive states that IRT projects must be conducted "off base in the civilian community."¹²⁸ This would presumably curb, for example, the building of a war memorial on a military base for a veterans organization or the provision of medical services to civilians using on-base facilities.

4. Does the Project Sufficiently Involve a Link to Military Training?

This is perhaps the most important legal restriction of all, for Congress took great efforts to ensure the link between valid training and the conduct of civil-military projects when it enacted the IRT statute, plainly stating that IRT projects may be pursued only if "the provision of such assistance is incidental to military training."¹²⁹ In this regard, 10 U.S.C. § 2012 is quite specific on what constitutes a legal fulfillment of the training function. The project must:¹³⁰

A. Involve valid military training. In the case of assistance by an entire unit, the project must accomplish valid unit training requirements. In the case of assistance by an individual [service member], the tasks must be directly related to the specific military occupational specialty of the member.¹³¹

B. Not adversely affect the quality of the military training.¹³²

C. Not result in a significant increase in the cost of training.¹³³

Again, a few comments are necessary. First, the requirement of valid unit training "does not apply in a case in which the assistance to be provided consists primarily of military manpower and the total amount of such assistance in the case of a particular project does not exceed 100 man-hours."¹³⁴ In such cases, most manpower requests will be met by "volunteers, and . . . any assistance other than manpower will be extremely limited. Government vehicles may be used [in these particular instances], but only to provide transportation of personnel to and from the work site. The use of Government aircraft [in these particular instances] is prohibited."¹³⁵

Second, the potential for adverse affect on the quality of military training is largely a common sense issue. Units should not

126. *Id.* at 3.

127. *See infra* notes 169-74 and accompanying text.

128. DOD Dir. 1100.20, *supra* note 5, at 12.

129. 10 U.S.C. § 2012(a)(2) (2000).

130. *See id.* § 2012(d); DOD Dir. 1100.20, *supra* note 5, at 4.

131. 10 U.S.C. § 2012(d)(A)(i)-(ii); DOD Dir. 1100.20, *supra* note 5, at 4. The language of 10 U.S.C. § 2012 is relatively vague in defining military training, and the services have sometimes struggled to determine what constitutes valid training when it comes to IRT projects. Both the DOD regulations and individual service regulations may provide further explanation. For example, *DOD Directive 1100.20* defines "military training" as "[t]he instruction of personnel to enhance their capacity to perform specific military functions and tasks; the exercise of one or more military units conducted to enhance their combat readiness; and the instruction and applied exercises for the acquisition and retention of skills, knowledge, and attitudes required to accomplish military tasks." DOD Dir. 1100.20, *supra* note 5, at 12. This definition should suffice for unit projects, as all of the services rely on this broad definition and repeat the DOD guidance that unit projects must accomplish "valid unit training requirements." *See supra* notes 99-101 and accompanying text. Non-Army units and personnel should note, however, that *DOD Directive 1100.20* and other DOD guidance—perhaps reflecting the Army origins of the IRT program by using Army-centric language—sometimes refer to the "Mission-Essential Task" when defining valid unit training. Though this term is not regularly used in all of the military services, *DOD Directive 1100.20* defines the Mission-Essential Task as "[a] collective task in which an organization must be proficient to accomplish an appropriate portion of its wartime mission(s)." DOD Dir. 1100.20, *supra* note 5, at 13.

In the case of IRT assistance by an individual service member, the definitions must necessarily be more service-specific. The *DOD Directive 1100.20*—again using Army-centric language—states that assistance by an individual service member must "involve tasks directly related to the specific military occupational specialty [MOS] of the member." *Id.* at 4. For Army and Marine Corps personnel, this would entail training within the MOS. *See Army IRT Policy Memorandum, supra* note 101; FM 100-19, *supra* note 73; FMFM 7-10, *supra* note 73. For Air Force personnel, this would entail training within the Air Force Specialty Code (AFSC) of the member. *See AFI 36-2250, supra* note 99, at 2. For Navy personnel, this would involve training related to the member's Naval Officer Billet Classification (NOBC) or Navy Enlisted Classification (NEC). *See OPNAVINST 1571.1, supra* note 100, at 3.

132. 10 U.S.C. § 2012(d)(B).

133. *Id.* § 2012(d)(C).

134. *Id.* § 2012(d)(2); DOD Dir. 1100.20, *supra* note 5, at 4.

trade military training such as participation in war games for a lower quality of training in the civilian community. The Army has given some wise advice along the same lines in its internal IRT regulations: "Commanders must ensure that IRT does not result in task over-training" through repetitiveness.¹³⁶

Finally, Congress has taken the requirement that IRT projects not result in a significant increase in the cost of training so seriously that it now requires each military unit requesting to participate in a particular project to "include an analysis and certification that the proposed project not result in a significant increase in the cost of training."¹³⁷ Neither § 2012 nor *DOD Directive 1100.20* explain what constitutes a "significant increase,"¹³⁸ but the comprehensive approach taken by the Navy may be of assistance. While DOD merely requires the signature of a flag or general officer certifying that the project will not result in a significant increase in the cost of training,¹³⁹ the Navy requires each unit submitting an IRT request to include a detailed cost analysis, providing a template for this report.¹⁴⁰ The Navy report requires a detailed comparison of "training costs" (the Navy's cost if it completed the project without the shared participation of the requesting organization) with "projected project costs" (the Navy's cost with the shared participation of the requesting organization) to arrive at a "savings incurred" figure.¹⁴¹

5. Is Your Unit the Proper One To Accomplish the Project?

Although any military unit is theoretically capable of performing an IRT project, *DOD Directive 1100.20* has narrowed

the recommended types of units, again through the use of Army-centric language: "IRT activities . . . shall be accomplished *primarily* by combat service support (CSS) units, combat support (CS) units, and personnel *primarily* in the areas of healthcare services, general engineering, and infrastructure support and assistance."¹⁴² The individual service regulations largely echo this language, though the Air Force and Navy guidelines understandably do not use the Army concepts of CSS and CS. Though the DOD guidance clearly opens the *possibility* that purely combat units may participate in IRT projects, the chosen language probably reflects the reality that it would be difficult for combat units to perform valid military training in the civilian community.

Even if a unit determines that it can conduct valid military training, it may not always be the best unit to conduct the particular project. In these cases, awareness of other units in the geographic area—regardless of military service—is a valuable tool in deciding how to best support IRT requests.¹⁴³

6. Have You Ensured that Your Unit Will Not Be Competing Against Private Businesses by Participating in the Project?

The IRT enabling statute and implementing regulations take great pains to ensure that the military will avoid competition with the private sector when performing IRT, even characterizing this goal as a "national policy."¹⁴⁴ In short, IRT may be accomplished only when "the assistance is not reasonably available from a commercial entity"¹⁴⁵ and "[d]oes not dupli-

135. DOD Dir. 1100.20, *supra* note 5, at 4.

136. Army IRT Policy Memorandum, *supra* note 101.

137. 10 U.S.C. § 2012(j)(3).

138. This was a criticism of the GAO in its 1998 review of the IRT program. See GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), available at <http://www.fas.org/man/gao/nsiad98084.htm>

139. See OASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

140. See OPNAVINST 1571.1, *supra* note 100, at encls. 2 and 3.

141. See *id.* at encl. 3.

142. DOD Dir. 1100.20, *supra* note 5, at 3 (emphasis added). For non-Army units, the *DOD Directive 1100.20* defines CSS and CS in further detail:

Combat Service Support (CSS). The essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war. Within the individual and theater logistic systems, it includes, but is not limited to, that support rendered by Service forces in ensuring the aspects of supply, maintenance, transportation, health services, and other services required by civilian and ground combat troops to permit those units to accomplish their missions in combat. CSS encompasses those activities at all levels of war that produce sustainment to all operating forces on the battlefield.

Combat Support (CS). Fire support and operational assistance provided to combat elements. CS includes artillery, engineer, military police, signal and military intelligence support.

Id. at 11.

143. See *infra* notes 175-77 and accompanying text discussing coordination with other military services and government agencies.

144. DOD Dir. 1100.20, *supra* note 5, at 3.

cate other public sector support or services available within the locale, State, or region where the assistance will occur.”¹⁴⁶ When these concerns are present, a unit has two methods of ensuring that no competition problems exist. First, 10 U.S.C. § 2012(c)(2) states that, even if the IRT services are available from a commercial entity, the project may still be pursued if “the official submitting the request for assistance certifies that the commercial entity that would otherwise provide such services has agreed to the provision of such services by the armed forces.” An even better assurance would be the inclusion of statements from any business entity that might normally place bids on the particular project, as well as statements from interested labor unions, that they have no objection to military involvement in the IRT project. A second method of ensuring that no competition problem exists comes from *DOD Directive 1100.20*, which states, “The determination of reasonable availability of assistance from a commercial entity may take into account whether the requesting organization or activity would be able, financially or otherwise, to address the specific civic or community need(s) without the assistance of the Armed Forces.”¹⁴⁷ A detailed statement along these lines from the requesting organization should suffice in making this determination. Of course, the use of both of these methods in the same request would address the competition issue even more decisively.

7. Does the Project Abide by All Other Laws and Regulations Beyond the IRT Legal Guidelines?

The IRT program is not to be “construed as authorizing . . . the use of Department of Defense personnel or resources for any program, project, or activity that is prohibited by law.”¹⁴⁸ At times, the statute and the implementing regulations are even more specific on the types of laws that must be adhered to when performing IRT, particularly those dealing with “the use of the armed forces for civilian law enforcement purposes or for

response to natural or manmade disasters.”¹⁴⁹ In addition to statutes, *DOD Directive 1100.20* warns that the military services may conduct IRT projects only when they “conform to . . . other applicable Military Department-level instructions, regulations, or policies.”¹⁵⁰ Some military regulations make special mention of the IRT program, such as the *DOD Joint Ethics Regulation*.¹⁵¹ For these reasons, it is vital that an attorney (or perhaps several attorneys within the same military office, such as the operational law attorney, the environmental law attorney, and the ethics counselor) review proposed IRT projects to ensure that other legal restrictions are not contravened.

Two particularly troublesome areas are IRT projects that involve engineering or medical support. Participation by military units in engineering projects raises a host of environmental issues. The starting point for any legal review of these projects should be the environmental impact analysis process required by the National Environmental Policy Act (NEPA).¹⁵² Judge advocates must consult the DOD and service-specific guidance on NEPA when reviewing any IRT involving engineering projects.¹⁵³

Medical projects also face strict external legal guidelines. In fact, *DOD Directive 1100.20* states that military units must:

[e]nsure, in the case of healthcare assistance, that activities comply with all applicable local, State, Federal, and military requirements governing the qualifications of participating military healthcare providers, and regulating the delivery of healthcare in the particular locale, State or region where a medical IRT activity is to be conducted. The most stringent requirements shall control when a conflict exists.¹⁵⁴

145. 10 U.S.C. § 2012(c)(2) (2000).

146. DOD Dir. 1100.20, *supra* note 5, at 5.

147. *Id.* at 4.

148. 10 U.S.C. § 2012(i).

149. *Id.* § 2012(i)(1). See also DOD Dir. 1100.20, *supra* note 5, at 2. Readers should note, however, that “Civil Affairs (CA), civil disturbance, and disaster-related civil emergency training are considered among the type of IRT activities authorized under 10 U.S.C. § 2012.” *Id.* at 2 (emphasis added).

150. DOD Dir. 1100.20, *supra* note 5, at 7-8.

151. See U.S. DEP’T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, para. 3-211(a)(6) (Aug. 6, 1998).

152. 42 U.S.C. §§ 4321-4370d (2000).

153. See, e.g., U.S. DEP’T OF DEFENSE, DIR. 6050.1, ENVIRONMENTAL EFFECTS IN THE UNITED STATES OF DOD ACTIONS (30 July 1979); U.S. DEP’T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988); U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 5090.6, EVALUATION OF ENVIRONMENTAL EFFECTS FROM DEPARTMENT OF THE NAVY ACTIONS (26 July 1991); U.S. DEP’T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5090.1B, ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, CHAPTER 2, PROCEDURES FOR NEPA (1 Nov. 1994); U.S. DEP’T OF AIR FORCE, INSTR. 32-7061, THE ENVIRONMENTAL IMPACT ANALYSIS PROCESS (24 Jan. 1995).

154. DOD Dir. 1100.20, *supra* note 5, at 8.

Accordingly, medical IRT projects require the submission of more detailed information than normal in the requesting packet.¹⁵⁵

8. Have You Adequately Addressed Funding of the Project?

By this stage, units should have already determined if participation in the IRT project would result in a significant increase in the cost of training. This is not the end of the matter, however. If training issues were the primary concern of Congress when it enacted the IRT statute, then funding issues are surely a close second. Both the IRT statute and the implementing regulations contain detailed oversight and cost accounting procedures that must be followed.¹⁵⁶ These procedures include submission of cost estimates in the original request packet,¹⁵⁷ tracking of costs by the officer in charge, and reconciliation of the costs in the required after-action report that must be submitted upon completion of the IRT.¹⁵⁸ Operations & maintenance (O&M) funding expenditures

are authorized for expendable readiness training items only. They may include, but are not limited to: fuel; equipment lease; travel; training supplies; and incidental costs to support the training not normally provided for a deployment IRT O&M funds are not authorized for the payment of civilian manpower contracts ([for example], contracting a civilian labor force to perform duties related to [IRT] activities).¹⁵⁹

After determining whether the IRT project will significantly increase the cost of training, a unit must decide whether the par-

ticular project can be accomplished without supplemental funding. This determination is critical, for it will determine who can approve the project and the deadline for submitting the proposal. Any request for supplemental funding must be submitted through the chain of command for eventual decision by the ASD-RA.¹⁶⁰ Normally, the individual military services have more autonomy in approving IRT projects.¹⁶¹ In addition, units "shall submit project packages that request [supplemental] IRT funds for the next fiscal year to arrive at OASD-RA no later than [the last day of] February each year."¹⁶² Normally, IRT requests may be submitted at any time during the year.¹⁶³ The supplemental funding available for IRT projects is currently \$20 million per year, with plans to continue this level of funding through fiscal year 2005.¹⁶⁴

9. Have You Addressed Liability Issues Surrounding the Project?

Two sub-issues must be addressed here: the liability of the individual service member, and the liability of the government. Section 2012 and the implementing regulations are remarkably silent on these issues, though the Navy's IRT regulation does address liability of medical personnel in great detail.¹⁶⁵ Most liability issues will be governed by the Federal Tort Claims Act (FTCA),¹⁶⁶ which in most cases should protect the individual service member from personal liability for participation in IRT.¹⁶⁷ However, units can ensure that claims do not rise to FTCA litigation by pursuing two remedies from the requesting organization up front: liability insurance and releases from liability. The Department of the Army previously had a superb guide to liability issues as they affected civil-military projects in the form of the now-rescinded *Army Regulation 28-19*. A modified section of that void regulation, though no longer bind-

155. See *infra* note 188 and accompanying text.

156. See, e.g., 10 U.S.C. § 2012(j) (2000).

157. See *infra* note 187 and accompanying text.

158. See *infra* notes 195-98 and accompanying text.

159. OASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

160. See *id.*

161. See *generally id.*; DOD DIR. 1100.20, *supra* note 5.

162. OASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

163. See *id.*

164. See E-mail from Colonel Diana Fleck, OASD-RA, to W. Kent Davis (Aug. 23, 1999) (on file with author).

165. See OPNAVINST 1571.1, *supra* note 100, at 9, encl. 1.

166. 28 U.S.C. §§ 2671-2680 (2000).

167. For a discussion of the FTCA as it applies to the military service member, see ADMINISTRATIVE AND CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 241, FEDERAL TORT CLAIMS ACT (Apr. 1998).

ing, still serves as sage advice to units wishing to participate in IRT projects:

In supporting [IRT] programs, commanders must recognize the possibility of property damage, injury, or death to participants and of [government] liability in this connection. This possibility should not be allowed to limit program support since [the government] is prepared to assume liability and to assist participating [military] personnel in the event of liability claims resulting from their services. Commanders should, however, follow procedures outlined below . . . to insure protection of the interests of [the government] and program participants. . . .

Procedures.

a. Insurance.

(1) *Active [Military] and [Military] Reserve.* Since there is no authority for the [government] to purchase liability insurance, the purchase of liability insurance by the [requesting organization] should be strongly encouraged. Active [Military] and [Military] Reserve personnel may . . . be held personally liable for injury and damage caused by them while participating in [IRT], even though such acts are covered by the Federal Tort Claims Act. The [requesting organization] should be advised that the necessity of liability insurance is to insure full and prompt protection for personnel participating in [IRT] activities. However, [military] participation will not be contingent upon the obtaining of liability insurance unless such insurance is specifically required by other directives or regulations.

(2) . . . *National Guard*
National Guard personnel may be held per-

sonally liable for injury and damage caused by them while participating in [IRT], and they are not covered by the Federal Tort Claims Act unless they are called or ordered into active Federal service. For this reason, participation by National Guard units or individuals will not be authorized unless the project sponsor provides liability insurance in an amount satisfactory to the adjutant general concerned.

b. *Release of liability.* [Requesting organizations] should be encouraged to enter into general releases or agreements with the [government] to save and hold the United States and the members concerned harmless from claims against them in personal injury, death, or damage resulting from activities under this regulation. However, the furnishing of [IRT] support will not be contingent upon the obtaining of general release agreements, unless such agreements are specifically required by other directives or regulations. . . .

Liability. The furnishing of [IRT] support by the [government] is an official function. All [military] personnel participating in such sanctioned support will be considered to be performing an official duty and acting as agents for the [DOD] at such times, whether in a duty or an off-duty status. As such, [military] personnel participating in sanctioned [IRT] activities will be provided the same full assistance in the event of liability claims resulting from their service as they would receive in the event of a similar claim arising out of their performance of any other official function¹⁶⁸

168. AR 28-19, *supra* note 29, at 5-6 (rescinded 1987). The following is exemplary language currently recommended by the U.S. Army Reserve Command to its subordinate units for IRT releases from liability:

The [requesting organization] agrees to:

1. Release the United States Army Reserve, the [unit] and its subordinate units, its officers, employees, agents, and servants from any claim, demand, damage action, liability, or suit of any nature whatsoever, excluding, however, those arising solely from the intentional torts or gross negligence of the United States Army or its agents.
2. Indemnify, defend, and hold harmless the United States Army Reserve, the [unit] and its subordinate units, its officers, employees, agents, and servants from any claim, demand, damage action, liability, or suit of any nature whatsoever for or on account of any injury, loss, or damage to any person or property arising from or in any way connected with ongoing IRT missions and support to the agency named below, excluding, however, those arising solely from the intentional torts or gross negligence of the United States Army Reserve or its agents.

See Release and Hold Harmless Agreement, provided by Mr. Richard Smith, Installation Law Attorney at the U.S. Army Reserve Command, Fort McPherson, Georgia (on file with author).

10. *Is There Another Military Program Other than IRT that Would Better Address the Project?*

Section 2012 clearly expresses Congress's intent that the IRT program is meant to supplement, rather than replace, other means of community participation, stating that "units or individual members of the armed forces . . . [may] provide support and services to non-Department of Defense organizations and activities . . . if . . . such assistance is authorized by a provision of law (other than this section)."¹⁶⁹ In these cases, the IRT restrictions—particularly the required link to military training—do not necessarily apply.¹⁷⁰ Perhaps the most common alternative to IRT are "customary community relations and public affairs activities" noted in the IRT statute itself,¹⁷¹ which are governed by *DOD Directive 5410.18* and *DOD Instruction 5410.19*, as well as individual service regulations.¹⁷² Determining whether a project should be conducted as IRT or community relations is sometimes difficult, but the key is remembering the primary focus of IRT: military training. Put another way, if the main focus of the project is the conduct of military training, then IRT is the appropriate program. If military training is not

the primary focus, and the main impetus is benefit to the requesting organization, then community relations is probably the appropriate program.¹⁷³ If a project does not fit neatly into either the IRT or community relations programs, a host of other laws permit community participation.¹⁷⁴

11. *Have You Coordinated with Other Military Services or Other Government Agencies, Especially for Joint Projects?*

The *DOD Directive 1100.20* requires that all IRT projects "[b]e coordinated among the Military Departments and other Federal, State, and local agencies to avoid duplication."¹⁷⁵ As mentioned above, units often participate in joint projects when conducting IRT. In these cases, ASD-RA policy states that units are responsible for "[c]oordinating with other Service/Component POCs participating in the project (to include gathering final project costs for After Action Reports)."¹⁷⁶ Even in cases where no other military service assistance is requested, it is wise to determine if another military unit could better support the request.¹⁷⁷

169. 10 U.S.C. § 2012(a) (2000).

170. See generally *id.* § 2012(a)(2).

171. *Id.* § 2012(b)(1).

172. See, e.g., AR 360-61, *supra* note 41; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5720.44A, DEPARTMENT OF THE NAVY, PUBLIC AFFAIRS POLICY AND REGULATIONS (3 June 1987); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5350.6A, NAVY COMMUNITY SERVICE PROGRAM (19 July 1994); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5760.5B, NAVY SUPPORT AND ASSISTANCE TO NATIONALLY ORGANIZED YOUTH GROUPS (22 Nov. 1994); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5760.2C, POLICY AND RESPONSIBILITY FOR NAVY YOUTH PROGRAMS AND NAVY SUPPORTED YOUTH ORGANIZATIONS (20 Dec. 1985).

173. This is not the end of the analysis if a particular project is to be undertaken as community relations. *Department of Defense Directive 5410.18* defines the community relations program as:

- Any planned and executed action by a DOD Component, unit, or person, designed to achieve and maintain good relations with all of the various publics with which it interacts. Such a program can be conducted on or off a military reservation. Community relations programs are conducted at all levels of command, both in the United States and overseas. Community relations programs include, but are not limited to such activities as:
- Armed Forces participation in international, national, regional, State and local public events;
 - Installation open houses, tours and embarkations in naval vessels and military aircraft;
 - Cooperation with Government officials and community leaders;
 - Aerial demonstrations and static display of aircraft;
 - Encouragement of Armed Forces personnel and their dependents to participate in all appropriate aspects of local community life.
 - Liaison and cooperation with labor, veterans and other organizations and their local affiliates at all levels;
 - Liaison and cooperation with industry and with industrial, technical and trade associations; and
 - Provision of speakers.

U.S. DEP'T OF DEFENSE, DIR. 5410.18, COMMUNITY RELATIONS, para. 3-2 (3 July 1974).

174. The following are just a few examples. The Interservice and Intragovernmental Support Program allows military units to provide support to other military services and other federal agencies. See U.S. DEP'T OF DEFENSE, INSTR. 4000-19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT (9 Aug. 1995). The Sponsored Unit Program allows Selected Reserve "units to affiliate with civilian or nonmilitary governmental organizations to perform inactive duty training (IDT). This training is intended to improve the quality and readiness of the individual soldier and unit, thus enabling enhancement of individual and unit efficiency and preparedness for military operations." Commonly used to train medical personnel in civilian hospitals, this program has counterparts in the other services. See U.S. DEP'T OF ARMY, REG. 140-1, ARMY RESERVE MISSION, ORGANIZATION, AND TRAINING, ch. 6 (1 Sept. 1994); see also 10 U.S.C.S. § 4301 (LEXIS 2000). The Adopt-a-School Program allows military units to form partnerships with local schools and provide tutoring and other services to children. See Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 91111, 103 Stat. 112. There are alternate names for this program, such as the Army's Partnerships with Schools and the Navy's Personal Excellence Partnership program. Finally, the Donation of Computer Equipment Program allows the transfer of DOD computer hardware to civilian schools. See Exec. Order No. 12,999, 61 Fed. Reg. 17,227 (Apr. 17, 1996). See generally NAVY COMMUNITY SERVICE PROGRAM, NAVY PERSONNEL COMMAND, COMMUNITY SERVICE GUIDEBOOK (nd) (discussing many of these programs), available at <http://www.bupers.navy.mil/pers605/index.html> (Navy Community Service Program Web site).

175. DOD Dir. 1100.20, *supra* note 5, at 3.

12. *Have You Made Use of the Appropriate Public Affairs Assets, Including IRT Advisory Councils?*

Though training is the primary focus of IRT, there is nothing that precludes incidental benefits to the military. One benefit often overlooked in IRT projects is the positive publicity that results from participation in community projects. From this publicity flows tremendous goodwill in the civilian community as well as important recruiting opportunities. Commanders and attorneys should ensure the public affairs officer (PAO) is involved from the beginning in any IRT project. In turn, the PAO should turn these projects into external press releases, internal stories, and other marketing tools.

Another public affairs tool is the use of diverse advisory councils to help plan IRT projects. The IRT statute itself encourages the use of these assets and suggests their composition:

The Secretary of Defense shall encourage the establishment of advisory councils at regional, State, and local levels, as appropriate, in order to obtain recommendations and guidance concerning [IRT] assistance . . . from persons who are knowledgeable about regional, State, and local conditions and needs The advisory councils should include officials from relevant military organizations, representatives of appropriate local, State, and Federal agencies, representatives of civic and social service organizations, business representatives, and labor representatives.¹⁷⁸

13. *Have You Assembled the IRT Request Packet Correctly and Made Plans To Forward It to the Proper Officials?*

Once a unit has addressed all of the preceding twelve concerns, it is time to assemble a formal IRT packet and submit it through the chain of command to the appropriate approval authority. The following items must be included:

(1) A formal request from the unit for approval to conduct an IRT project, in the format approved by ASD-RA. A sample letter in the ASD-RA format is available on the DOD IRT Web-site.¹⁷⁹ This letter must include two mandatory items or risk automatic rejection: (a) a certification that the project will not result in a significant increase in the cost of training;¹⁸⁰ and (b) the signature of a flag or general officer.¹⁸¹

(2) The original letter from the requesting organization asking for IRT support, signed by a responsible official of that organization.¹⁸² For requesting organizations not automatically entitled to IRT support under 10 U.S.C. § 2012(e)(1) or (2), and seeking approval on a case-by case basis under § 2012(e)(3), the original request must be accompanied by a copy of the requesting organization's bylaws and current evidence of the organization's non-profit tax status.¹⁸³

(3) Environmental documentation for IRT engineering projects.¹⁸⁴

(4) Proof of liability insurance and/or release from liability if obtained from the requesting organization.¹⁸⁵

(5) Identification of an officer in charge of the project.¹⁸⁶

(6) Review and endorsement of the proposal by the following military officials:

(a) Staff judge advocate or legal officer;

(b) United States property and fiscal officer (USPFO) or federal budget officer responsible for obligating and disbursing federal funding to verify that:

176. IRT Web Site, *supra* note 6.

177. *See supra* note 143 and accompanying text.

178. 10 U.S.C. § 2012(h) (2000). *See also* DOD Dir. 1100.20, *supra* note 5, at 5.

179. *See* IRT Web Site, *supra* note 6. Navy units may find a sample specifically tailored to their needs by examining enclosure (2) of OPNAVINST 1571.1, *supra* note 100.

180. *See supra* notes 137-41 and accompanying text.

181. *See supra* note 139 and accompanying text.

182. *See supra* note 122 and accompanying text.

183. *See supra* notes 123-24 and accompanying text.

184. *See supra* notes 152-53 and accompanying text.

185. *See supra* note 168 and accompanying text.

186. *See* IRT Web Site, *supra* note 6. The duties of the officer in charge of the IRT project are discussed *infra* notes 195-98 and accompanying text.

(1) Supplies and equipment items are on the Government Services Administration (GSA) schedule or local purchase and that the prices are fair and reasonable;

(2) The estimated cost for each project is delineated by operations and maintenance (O&M) and pay and allowances (P&A) for each service or component participating; and

(3) Fiscal accountability is in accordance with current comptroller directives.

(c) Plans, operations, and training officials; and

(d) Inter-governmental agencies (if participating or having an interest in the IRT project).¹⁸⁷

(7) For medical projects, the IRT packet must include even more detailed information.¹⁸⁸

Once the packet is assembled, the final approval authority must be determined. The ASD-RA, though now the DOD approval authority for IRT projects, has delegated this authority to the individual services in most cases. Under current ASD-RA policies, only two types of projects must be submitted to ASD-RA for approval: (1) those projects in which the requesting organization is not automatically entitled to IRT support under 10 U.S.C. § 2012(e)(1) or (2) and is seeking approval on a case-by case basis under § 2012(e)(3);¹⁸⁹ and (2) those projects requesting supplemental funding or reallocation of IRT funds from another IRT project.¹⁹⁰ All other projects may be approved by the individual services under the DOD-level guidelines. However, the individual services have taken different approaches to further delegate this authority.

187. See IRT Web Site, *supra* note 6.

188. In these cases, the packet must identify the governing body of the federal, regional, state, or local civilian health organization (CHO) that agrees to all IRT activities performed by military personnel. The CHO must then certify that the project: (1) accommodates an identified underserved healthcare need that is not being met by current public or private sector assistance, including a description of the criteria used to identify the medically underserved community and the specific services they require; and (2) is provided in a manner that does not compete with private sector medical, dental, or healthcare assistance in the underserved area.

In addition, the CHO must verify and identify the agent (whether military or civilian) who will be responsible for compliance with the following during the IRT: (1) medical waste handling and disposal; (2) Clinical Laboratory Improvement Act (CLIA); (3) credentialing and privileging of military health care providers to include basic life support and, if applicable, advance trauma and cardiac requirement; (4) emergency evacuation of a "real life incident;" (5) follow-up care of patients for continuity of care; and (6) handling of patients' records for continuity of care and Privacy Act issues.

Finally, medical IRT projects must ensure that all participating military personnel: (1) in direct contact with the patient population, use universal body substance isolation precautions as developed by the Center for Disease Control and Occupational Safety and Health; (2) have completed required immunizations (to include Hepatitis B series) in accordance with their service regulations; (3) have a current negative Human Immunodeficiency Virus (HIV) test in accordance with their service regulations. See IRT Web Site, *supra* note 6.

189. See DOD DIR. 1100.20, *supra* note 5, at 8.

190. See *supra* notes 160-64 and accompanying text.

191. Army IRT Policy Memorandum, *supra* note 101.

192. See *id.*

193. See AFI 36-2250, *supra* note 99, at 2-3.

194. See OPNAVINST 1571.1, *supra* note 100, at 5.

195. 10 U.S.C. § 2012(j)(5) (2000).

196. See IRT Web Site, *supra* note 6.

The Army is perhaps the most permissive in its approach. It has delegated its approval authority to "commanders of Major Commands (MACOMs)," and "to streamline the approval process," considers "the Army National Guard and Office, Chief Army Reserve" to be MACOMs for IRT purposes.¹⁹¹ The Army even allows the MACOMs to further delegate approval authority to commanders of major subordinate commands, but no further than that level.¹⁹² The Air Force has taken a more cautious approach, resting its approval authority with the Deputy Assistant Secretary for Reserve Affairs.¹⁹³ The Navy has taken a similar approach by resting the same IRT approval authority with the Chief of Naval Operations.¹⁹⁴

14. Do You Have an Officer in Charge Who Can Supervise and Track the Project for Filing of an Appropriate After-Action Report?

Once approved, the unit is not quite finished with the legal requirements. Section 2012 requires that units "[p]rovide for oversight of project execution to ensure that [the IRT] project . . . is carried out in accordance with the proposal for that project as approved."¹⁹⁵ The ASD-RA seeks to ensure adherence to this provision by requiring each unit participating in an IRT project to appoint an officer in charge of the project.¹⁹⁶ The primary duties of the officer in charge, besides project oversight, are obtaining all of the required documents for submission of the IRT packet, coordination with all organizations participat-

ing in the project, and gathering of data for the after action report (AAR).¹⁹⁷

An AAR must be submitted to ASD-RA no later than sixty days after completion of the project. When more than one military service or government agency is participating in the project, participating units must forward their AAR information to the project lead agent no later than thirty days after project completion. The AAR submitted to ASD-RA must contain the following information:

- (1) The project name, location, and dates of accomplishment.
- (2) A breakdown of the number of military participants in each grade category by service or component and unit.
- (3) A list of the types of services performed, accompanied by numerical data such as the number of man-hours performed on the particular service or the number of patients seen.
- (4) A breakdown of all fiscal obligations (O&M and P&A) used to support the entire project. The breakdown must delineate ASD-RA funding obligations from service or component funding obligations if supplemental funding was approved for the project.

(5) Information about any media or public affairs activities and community, state, or congressional involvement.

(6) Any other relevant information.¹⁹⁸

Conclusion

The IRT program, having arrived in 1996 as the descendant of other civil-military programs, is growing in size as word reaches military units and civilian organizations eligible to participate in it. The legal parameters controlling the IRT program are complex and seemingly in a state of constant development. While it has presented incredible opportunities for both military training and public affairs, not to mention the incidental benefits to civilian communities, IRT has at times been subject to intense outside scrutiny. For these many reasons, it is imperative that commanders and attorneys understand the statutory and regulatory provisions governing IRT. By examining the fourteen points outlined in this article, units participating in IRT should be able to avoid the legal pitfalls and reap a training and public affairs windfall.

197. *See id.*

198. *See id.* For an excellent sample format for the AAR, see OPNAVINST 1571.1, *supra* note 100, encl. 4. Units should also be aware of one further follow-up action regarding IRT projects—the treatment of each service member's participation in such projects for evaluation and selection board purposes. In the 1997 amendments to the IRT statute, Congress added the following guidance on this topic:

(g) Treatment of member's participation in provision of support or services.

(1) The Secretary of a military department may not require or request a member of the armed forces to submit for consideration by a selection board (including a promotion board, command selection board, or any other kind of selection board) evidence of the member's participation in the provision of support and services to non-Department of Defense organizations and activities under this section or the member's involvement in, or support of, other community relations and public affairs activities of the armed forces.

(2) Paragraph (1) does not prevent a selection board from considering material submitted voluntarily by a member of the armed forces which provides evidence of the participation of that member or another member in activities described in that paragraph.

10 U.S.C. § 2012(g) (2000) (codifying Pub. L. No. 105-85, § 594, 111 Stat. 1764 (1997)).